IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.329 OF 1995.

The Regional Director,
Employees' State Ins.Corporation : Appellants.

versus

M/s.Reliance corporation : Respondent.

Mr.R.M.Jaykar i/by M.V.Jaykar & co. for the appellants.
Mr.S.M.Dharap for the respondent.

CORAM : D.G.DESHPANDE,J.

DATED : 22nd February 2005.

ORAL ORDER

1. Heard advocates for the appellants and respondents. This appeal is filed by the Regional Director Employees' State Insurance Corporation against the order of Judge, Employees' Insurance Court, Bombay dated 30th March 1992 by which the Application (ESI) No.125

of 1986 and 25 of 1987 filed by the Respondents were allowed and it was declared that the Applicant firm is not liable to pay contribution as claimed by the Appellant/Corporation in respect of its activities as an Interior Decorator.

2. The trial Court had framed three Issues. But the crucial Issue for the purpose of this appeal is Issue No.1 which is modified by me as under :-

> "Issue No.1 :- Whether the professionals and consultants engaged by the respondent in its business of interior decorations, furnishers, and designers of industrial and household premises would be the employees within of Section 2(9) of the E.S.I. Act, 1948?

3. I am aware that this is not a Writ Petition challenging applicability of the Act to the aforesaid persons, but it is an appeal arising out of an order in Applications filed by the respondent before the trial Court for a certain declaration that they are not liable to

pay contribution. But the question is of equal importance to all. But it is a question of importance to the appellants as well as to the respondent and, may be to the similarly placed persons like respondent.

4. The record and proceedings of the trial Court, particularly Application No.125 of 1986 show that the respondent had challenged two letters, vide letter dated 18-4-1986 (Form C-18), Exhibit 1 and, letter 10-11-1986 (Form C-19), Exhibit 2, before the trial Court. Exhibit-1 is the notice to the respondent by the appellant dated 18-4-1986 and it is stated therein that under Section 40, read with Section 39 of the Employees' State Insurance Act 1948 the Principal Employer of the factory/establishment covered under the Act is required to pay in respect of every employee both the Employer's Contribution and the Employees' Contribution at the rates specified in the First Schedule of the said Act. In para 2 (4) it was alleged that the respondent had not paid arrears of contribution as pointed out by their office letter No.B/Ins.X/31-20675 dated 29-5-85 and in the Calculation Column the calculation is made in respect of three types of

works i.e. 1. Piece rated work A/c.; 2. Carpentry work and; 3. Plumbing, paper work, electricity work etc.

5. Then Exhibit-2 is the letter dated 10.11.1986. It is addressed to the Collector of B.S.D. E.S.I. Dues Recovery Section, Bombay and the Collector is directed to recover the aforesaid amount from the respondent as arrears of land revenues as provided in Section 45-B of the Act. These are the two letters which were challenged by the respondent before the trial Court.

6. In their applications, challenging the two letters, stated above, the case of the respondent was that they are engaged in the profession of interior decoration, designing and furnishing and, as such they render their services to various industrial, commercial organisations as well as residential premises. Apart from the interior decoration, they were also having a small workshop wherein various types of furnitures, fixtures and fittings were being manufactured exclusively through manual

hand process without using any motive power. And therefore, there activities viz. professional and consultant in interior decoration, furnishers and designers of industrial and household premises and activities in wooden furnishing articles such as loose furniture i.e. table, chair etc, were entirely different and distinct and not connected with each other. They were not covered by the aforesaid Act. They contended in para (d) of their application that interior decoration involved following jobs :-

i) Painting of walls, Grills, Windows.
ii) Polishing and flooring
iii) Plumbing & Electrical Fittings.
iv) Carpentry and Polishing.
v) Designing.

and they contended that the aforesaid jobs are mostly done through various professionals and contractors either at their respective premises or at the premises of the party for whom the job is undertaken by the respondent depending upon the nature of job. It is further contended that the job allotted to the various such

professionals is exclusively done by them with their own volition, supervision and control for which they were in turn charging the respondent by submitting the bills. They further contended that the work done by them in the factory i.e. manufactures of wooden furnishing articles, and which was covered under E.S.I. Act was exclusively done by regular employees and it has no concern with the interior decoration profession or nor was it complementary or supplementary to the work done by the respective professionals and suppliers who have been carrying on the work in relation to interior at the premises of their various clients or clients of the respondent. They also contended that there was no relationship of master and servant between the respondent and the professionals and, there was no functional integrity or inter changeability. And, therefore, the respondent's activities of the above job were not covered by the E.S.I. Act. They also contended that the respondents were taking help of various professionals which includes painting, polishing, plumbing, electrical fittings, carpentry and designing and that work was carried out by respective professionals independently and

exclusively through their own manpower over which the respondent had no control. The manpower so used by the professionals was different at different places and, therefore, there was not connection or nexus between the activities of the respondent at factory where the E.S.I. Act was applicable. Various other pleas supporting the aforesaid main contentions were raised in their application by the respondent.

7. The Corporation had filed their written statement. It was admitted the the respondents were undertaking jobs of interior decoration and furnishing work from various industrial and commercial organisations as well as from individual owner of residential premises. It also admitted that the respondent utilised the services of various persons for decoration, designing and engineering work and the employees engaged through them. However, it was denied that the work done by the respondent at their factory was not the part and parcel of and directly related to the interior decoration work or vice versa. The corporation also contended that some part of the work of painting, polishing, plumbing, electric fitting, carpentry

& polishing, designing etc, were carried out partly by various persons. But according to the corporation this work was done independently without supervision of the respondent. The corporation also denied that there was no master and servant relationship between the respondent and the persons engaged by other professionals. According to the corporation, the work done at the factory as well as by the persons engaging for designing, painting work etc. was supervised by the respondent. The corporation further submitted in their written statement that the respondent besides employees engaged directly, engaged contractor/sub-contractors/employees engaged through contractors for various work such as carpentry, painting, polishing and such other work and such employees and employees of such contractors and/or such contractors were duly amenable to the provisions of E.S.I. Act and dues are payable by the respondent for the employees engaged through contractors or sub-contractors.

8. Therefore, the crucial question is, whether the respondent as professional, interior decorator, designer are liable to be covered

under the said Act and; Whether the judgment of the trial Court is liable to be set aside.

9. It was the main contention of Mr.Jaykar, appearing for the appellant, that by virtue of Notification dated 18.9.1978 issued under Subsection (5) of Section 1 of the E.S.I. Act by clause 3 of the said notification the shops have been included for covered under the said Act. The establishment of the respondent was a shop and, therefore, E.S.I. Act was applicable. Secondly, he relied upon three judgments of the Supreme Court reported in;

1] AIR 1994 SC 1154 (Employees State Insurance Corporation v. R.K.Swamy and others etc.). It was between the ESI Corporation and the advertising agency. The basis of the dispute was of the same notification referred to above. M/s.Dattaram Advertising (P) Ltd. were informed by the ESI Corporation that they were covered by the notification and were required to comply with the provisions of the said Act and make contribution thereunder. The advertising company, referred to above, resisted the claim and filed an application before the ESI Court

contending that they were not covered under the notification. The Court dismissed their application and, the appeal came to be filed before this High Court. The Single Judge held in favour of the advertising company. The ESI Corporation filed LPA and it was against the order of Division Bench, which upheld the contention of the advertising company. The matter went to the Supreme Court. The Supreme Court considered its four judgments in; **(1) Hindu Jea Band's case (ibid) (AIR 1987 SC 1166); (2) Regional Provident Fund Commrr. v. Shibu Metal Works (1965) 2 SC 72 : (AIR 1965 SC 1076); (3) M/s.Interntional Ore and Fertilizers (India) Pvt. Ltd. v. Employees' State Insurance Corporation (AIR 1988 Sc 79) and (4) M/s.Cochin Shipping co. v. E.S.I. Corporation (1992 AIR SCW 3021).** In para 16 the Supreme Court observed as ;

> "16. In the light of these judgments and the expanded meaning now given to the word "shop", the evidence which we have reproduced above setting out the different activities of an advertising agency needs to be considered. Clients

> call on an advertising agency to initiate campaigns for promotion of their products. Advertising campaigns can be conducted in the different media and otherwise. The advertising agency gives advice in this behalf and as to possible expenses. The advertising agency prepares and presents alternative campaigns for the client to choose from. For such purpose it much prepare the necessary art work and the appropriate words to go with it. It employs specialists in these fields. The advertising agency is paid for the service it renders as aforesaid by the client. It also receives commission from the media through whom advertising is done."

Then in para 17 it has been observed by the Supreme Court as ;

> "17. Anyone who has products to sell may approach an advertising agency. The advertising agency will prepare an advertising campaign for him utilising

> the services of the experts it employs in this behalf. It sells the campaign to the client and receives the price thereof. Indubitably, the price will depend upon the nature of the campaign, but that does not, in our view, make any great difference. Essentially, the advertising agency sells its expert services to a client to enable the client to launch at effective advertising campaign of his products. without straining language, the premises of an advertising agency can, therefore, reasonably be said to be a ‘shop’, as now understood."

And, therefore, the appeals were allowed and the impugned orders were set aside.

10. Mr.Jaykar for the appellant also relied upon the another judgment of this High Court reported in **1980 LAB I.C. 100 (Poona Industrial Hotel Ltd. v. I.C.Sarin and another)**. In that case the petitioner Poona Industrial Hotel was a limited company having its registered office at Koregaon Road, Poona. The petitioner in that

matter challenged the view taken by the Employees' State Insurance Corporation that the E.S.I. Act was applicable to their establishment i.e. Hotel Blue Diamond. It was the case of the petitioner that there were 92 rooms in the hotel for residence of guests and the primary object of the hotel was to provide residential accommodation to the guests and in order to make the stay of the guests more comfortable, the hotel also provides food and beverages to its guests. The hotel employed 227 persons out of whom 45 were working in the kitchen. The question was, whether the hotel could be treated as factory and, whether the provisions of ESI Act would be enforced against the hotel Blue Diamonds a whole, and, therefore, the hotel owners filed a writ petition in this Court to withdraw the notices sent to it by the ESI Corporation. The Division Bench of this Court, after considering meaning of the word "factory" in the ESI Act, and after considering the views taken by the Division Bench of Madras High Court, this High Court came to the conclusion that the hotel was a factory. The court concluded that the question was not what was dominant object of the establishment knows as Hotel Blue Diamond, but the question

was, whether the establishment of the factory.

11. On the basis of aforesaid two judgments, Mr.Jaykar strenuously urged that the activities of the respondent in the present appeal were also liable to be covered under the ESI Act. Firstly because it was a shop and, secondly, it was the respondent who was the employer, direct or indirect, of those intermediaries in executing their work of interior decoration. He also contended that if the furnishing business carried on by respondent was covered by ESI Act, then their activities like of interior decoration were also liable to be covered on the basis of the judgment of Division Bench of this Court regarding Hotel Blue Diamond.

. In my opinion, the contention raised by Mr.Jaykar in this present appeal cannot be accepted. Even the authorities relied upon by him are of no help to him for the following reasons.

. The activity which is sought to be covered is of interior decoration. The respondent is doing job of consultation in that

regard. The activity of interior decoration at that relevant time included;

i) Painting of walls, Grills, Windows.
ii) Polishing and flooring
iii) Plumbing & Electrical Fittings.
iv) Carpentry and Polishing.
v) Designing.

According to the respondent, they were doing this interior decoration for industrial, commercial organisations as well as residential premises. If that is so, then let us considered the whole issue from a practical point of view. For Example, X is an interior decorators having his office at Fort, Mumbai. Industrial offices, Commercial and residential houses and private persons approach from all over the Bombay for interior decoration. He accepts work in Fort and out side the Fort. For e.g. he gets some work for industries at Goregaon and some work for commercial houses at Bandra, Kurla, Ghatkopar and Parel and, about dozen of interior decoration works in respect of residential houses scattered all over the Bombay. For the interior decoration activity of the aforesaid five types and jobs,

admittedly and obviously he cannot make himself present at all those jobs. He will have to entrust contractors, subcontractors and experts in that field of that local area.

. Therefore, for painting of walls, grills, windows for all those places, he will have to appoint painters or contractors to do the work of painting through their hired labourers.

. For polishing and flooring, he will have to engage different contractors for different works at different places for doing the said work who will get this work done through the labourers employed by them.

. For doing plumbing & electrical fittings at all the aforesaid places he will have to engage electrical contractors who will get this work done through their labourers and so and so forth.

. Therefore, in the entire work of interior decoration, X will have to engage different contractors at different places who will, through

their own manpower or labour power, have to carry out and execute the works assigned by X. And for that work X will be giving specific amount to the different contractors. He receives instructions from his clients, and his job will be to give directions and get the work done what his client wants and, for that to claim commission in the work. X will not be concerned as to how a painting contractor finishes the work, how many labourers he engages, whether they are temporary or permanent, whether they are skilled or unskilled, whether the contractor invites different workers at different places. X will not control those labourers, they will not be answerable to X, they will not be paid by X nor they can be sacked or removed by X.

12. Now if what Mr.Jaykar contends is accepted, the consequence will be, X the interior decorator, and the contractors, he engaged at different places in Bombay for doing his different jobs at different commercial, industrial or residential houses and all labourers employed by those contractors, temporary or permanently, will have to be

considered as the persons under the employment of X and, for all of them X will have to pay contribution under the E.S.I. Act. The work entrusted to those contractors may be completed within 8 day, or 15 days or one month and, then will have to take another work or other job. Therefore, every time he will have to entrust the work to different contractors of those working for him and employees of the contractors will have to be cared for and provided for by X by making his contribution in respect of and all of them under the ESI Act.

13. This cannot be the expectation of law and ESI Act is not, in my opinion, meant for this. In the two judgments relied upon by Mr.Jaykar what is pertinent to note is that so far as Hotel Blue Diamond is concerned, all those 227 employees were working under the same roof in the same hotel along with those 45 who were working in the kitchen. So far as advertising case is concerned, though the Supreme Court has defined the scope of advertising agency work, it has no where laid down that the advertising agency will have to pay the contribution of those workers of an advertising agency throughout particular State

or through out the country. Therefore, arguments of Mr.Jaykar regarding applicability of ESI Act to the respondent cannot be accepted.

14. The respondent have examined witnesses and have stated about the nature of work done by them. It is exactly identical to the illustration taken by me as above. There is absolutely no evidence produced by the ESI corporation either independently or nothing was brought out on record by the cross examination of the witnesses of the respondent that those different contractors employed by them at different places for different jobs of interior decoration work, they had paid for by the respondent and respondent are also paying labourers charges of all those employed by the contractors. There is no nexus nor functional integrity or inter changeability.

15. Insurance Court rightly, therefore, allowed the application by impugned order. Even if the definition of shop is said to be applicable, the definition of shop as relied upon by Mr.Jaykar is said to be applicable to the present case, it will cover only those work in

the shop of the respondent or they may be out sider. But in any case, that definition cannot be stretch so as to cover all different contractors working for the respondent and the labourers or workmen employed by those contractors at different places at different time for different interior decoration work which are almost for temporary period or short duration. Therefore, for all these reasons I pass the following order :-

:ORDER:

The Appeal is dismissed.

No order as to costs.

The respondents will be entitled to get back refund of the amount if they have deposited at the time of stay granted by the lower Court with accumulated interest, if any.

Certified copy expedited.

[D.G.DESHPANDE]

22/02/2005 JUDGE.